Petition

81-1751

Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

No. 82

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

Jeanne M. Gay and Roger E. Gay,
Plaintiffs, Petitioners

v.

P. K. Lindsay Company, Inc.
Defendant, Respondent

On Writ of Certiorari to the United States
Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE STANDARDS APPLIED BY THE FIRST CIRCUIT IN REFUSING TO FULLY REVIEW THE DISTRICT COURT'S JURY INSTRUCTION ON SUPERCEDING CAUSE CONFLICT WITH THE PURPOSE OF RULE 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE AS INTERPRETED BY OTHER CIRCUIT COURTS AND BY THIS COURT IN PALMER V. HOFFMAN.

II. WHETHER THE STANDARDS APPLIED BY THE FIRST CIRCUIT IN REFUSING TO FULLY REVIEW THE DISTRICT COURT'S JURY INSTRUCTION ON SUPERCEDING CAUSE CONFLICT WITH THE PLAIN ERROR DOCTRINE AS INTERPRETED BY OTHER CIRCUIT COURTS AND BY THIS COURT IN UNITED STATES V. ATKINSON.

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OPINION BELOW

The opinion of the First Circuit Court of Appeals from which this petition for Writ of Certiorari arises is Appendix A and is reported as **Gay v. P. K. Lindsay Company, Inc.**, 666 F.2d 710 (1st Cir. 1981). The order of the United States District Court for the District of New Hampshire ordering judgment for the defendant dated March 12, 1981, is not reported and is Appendix B.

Jurisdiction

The opinion of the First Circuit Court of Appeals is dated December 14, 1981. This Petition is being filed within 90 days of the Court of Appeals decision as permitted by 28 U.S.C. §2101(c). 28 U.S.C. §1254(1) gives this Court jurisdiction to hear this Petition.

RULE OF CIVIL PROCEDURE INVOLVED

Rule 51 of the Federal Rules of Civil Procedure provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

This is a diversity action under 28 U.S.C. §1332 brought in the United States District Court for the District of New Hampshire, in which the plaintiffs alleged that the defendant negligently loaded an air compressor into Jeanne Gay's station wagon in a precarious position without securing it so that when Mrs. Gay made a sudden turn when startled by a cloud of sand ahead of her vehicle, the compressor shifted, and the shifting weight of the compressor caused the Gay vehicle to fishtail out of control and roll over, badly injuring Mrs. Gay. The jury returned verdicts for the defendant, and the plaintiffs appealed to the First Circuit Court of Appeals challenging, among other things, a jury instruction given by the District Court suggesting the cloud of sand, which startled Mrs. Gay, had come from a truck ahead of Mrs. Gay's vehicle and instructing the jury to decide if the truck's dropping the sand was a superceding cause of the accident, which would relieve the defendant of liability for any negligence in its earlier loading of the compressor.[1]

Relying on Rule 51 of the Rules of the Federal Rules of Civil procedure, the Court of Appeals refused to fully review the correctness of the superceding cause instruction because it found that the plaintiffs' objection to the challenged instruction was not sufficiently specific on two of three grounds argued by the plaintiffs.[2]

The three grounds argued by the plaintiff were first, that there was no evidence the cloud of sand came from the truck in front of Mrs. Gay, and the Court was wrong to suggest the existence of such evidence by its charge; second, that there being no evidence of what caused the cloud of sand, there was no evidence from which the jury could find the cloud was a result of negligence of a third party, which is a prerequisite of the superceding cause defense; and third, that there being no basis for the jury to find the cloud of sand was the result of negligence of a third party, there was certainly no basis for the jury to find that the cloud of sand was the result of extraordinary and unforeseeable negligence, which is another prerequisite of the

1. Pertinent parts of the Court's instruction are set out in Appendix C.

2. The objection of plaintiffs' counsel and the District Court's reply are set out at page three of the First Circuit's opinion, which is Appendix A.

superceding cause defense.[3] The court of Appeals considered, and rejected, only the first ground set out above, and it refused to consider the other two grounds because of plaintiffs' alleged non-compliance with Rule 51. The Court also refused to review these grounds under the plain error rule.

REASONS FOR GRANTING CERTIORARI

I. Important Issues Affecting Appeals in All Federal Jury Cases are Involved

The rights of litigants to appelate review depend on the standards by which circuit courts judge the sufficiency of objections under Rule 51 and the standards by which they apply the plain error rule to grant review where objections were not sufficient under Rule 51.

The important right of appellate review should be governed by clear rules, which should be consistently followed by all Circuit Courts. Plaintiffs believe the current conflicting interpretations of Rule 51 by the Circuit Courts are not only unfair to those denied appellate review by application of a stricter standard, but the confusion and uncertainty about what is a sufficientiy precise objection will force litigants, anxious to preserve their right of appeal, to make exceedingly long, detailed and persistent objections, well beyond what is necessary to fairly alert trial courts to the substance of their objections.

II. The First Circuit is in Conflict with other Circuits on Standards for Judging the Sufficiency of Objections to Jury Instructions Under Rule 51

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3. In their Brief to the First Circuit, plaintiffs addressed the third ground first, the first ground second, and the second ground third. The Court of Appeals summarized its understanding of the three grounds as follows: "[F]irst, they allege that it allowed the jury to find that the cloud of sand was a superseding cause even if it was reasonably forseeable; second, they allege that it suggested that the cloud was caused by the negligence of a third party; and third, they allege that the instruction was not warranted by the evidence." Appendix A, Page 2.

Since this Court briefly considered the sufficiency of objections in **Palmer v. Hoffman**, 318 U.S. 109, 119, 63 S.Ct. 477, 87 L.Ed. 645 (1942), serious conflicts have developed between the circuit courts in their interpretation and application of Rule 51.

In Palmer, a negligence case where this Court found insufficient an objection, which did not distinguish between correct and incorrect portions of a charge on the burden or proof on the issue of contributory negligence, the Court said:

> In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. 318 U.S. at 119.

In the present case, the First Circuit interpreted this language from **Palmer** to warrant an extremely exacting standard for preserving objections, finding plaintiffs' objection to the superceding cause instruction not sufficient even though it specifically addressed the lack of evidence to justify the charge, as given, which lack of evidence was the central element of the three grounds relied upon by the plaintiffs in challenging the instruction on appeal.

In contrast, the Fifth, Sixth, Ninth and Tenth Circuits say that Rule 51 is not a rule of penalty or formality, that its purpose is merely to inform the Trial Court of possible errors, and that Rule 51 does not require that an objection state in specific terms the entire basis or reason for each objection. **Estate of Lutren v. Chesapeake and Ohio RR.**, 592 F.2d 941, 946 (6th Cir. 1979); **Robinson v. Heilman**, 563 F.2d 1304 (9th Cir. 1977); **Wallace v. Enec**, 521 F.2d 215 (5th Cir. 1975); **Taylor v. Denver and R.G.W.R. Co.**, 438 F.2d 351 (10th Cir. 1971); **Darter v. Greiner**, 301 F.2d 772 (10th Cir. 1962).

Several unsuccessful attempts have been made to have this Court review the sufficiency of objections under Rule 51. See, e.g., **Cohen v. Franchard Corp.**, 478 F.2d 115, 124 (2nd Cir. 1973), Cert. denied, 414 U.S. 857 (1973); **Smith v. Travelers Ins. Co.**, 438 F.2d 373 (6th Cir. 1971), cert. denied, 404 U.S. 832 (1971); **Pritchard v. Liggett and Meyers Tobacco Co.**, 350 F.2d 479 (3rd

Cir. 1965), cert. denied, 382 U.S. 987 (1965), amended 370 F.2d 95 (3rd Cir. 1965), cert. denied, 386 U.S. 1009 (1966).

The increasing conflicts between the Circuits over the meaning of Rule 51 are good reason for this Court to now review Rule 51; and the present case is a good vehicle by which to do so because the objection in question would appear to satisfy the standards applied by several Circuits, although it did not satisfy the First Circuit.

III. The First Circuit is in Conflict with Other Circuits On Standards for Applying the Plain Error Rule in Civil Cases

The Circuit Courts are in conflict on whether the plain error rule should be used in civil cases to grant review of instructions to which a sufficient objection was not made. The First Circuit, although acknowledging the plain error rule can be applied in civil cases, has never granted review under the rule in a civil case. Morris v. Travisono, 528 F.2d 856, 859 (1st Cir. 1976). The Ninth Circuit holds the plain error rule cannot be applied at all in a civil case to grant review of an instruction to which a proper objection was not taken. Crespo v. Fireman's Fund Indem. Co., 318 F.2d 174, 175 (9th Cir. 1963), and cases collected at 9 Wright and Miller, Federal Practice and Procedure, §2558, at 674 et seq. (1971). Other Circuits have freely applied the plain error rule in civil cases and, when state law was at issue, have scrutinized the applicable substantive state law as well as the applicable federal procedural law to determine the existence of plain error. Ball v. E.I. DuPont, 364 U.S. 715 (6th Cir. 1975); Smith v. Travelers Insurance Co., supra; Wilson v. American Chain and Cable Co., 364 F.2d 558 (3rd Cir. 1966); Leposki v. Railway Express Agency, Inc., 297 F.2d 849 (3rd Cir. 1962); Pridgin v. Wilkinson, 296 F.2d 74 (10th Cir. 1961).

In Wilson and Leposki the Third Circuit relied on the plain error doctrine to review erroneous superceding cause instructions. In Pridgin the Court said review should be granted under the plain error rule where the challenged instruction "may well have been a generating factor which culminated in a verdict not warranted by the law," while the First Circuit would apply the law only in "peculiar circumstances

to prevent a clear miscarriage of justice." Morris v. Travisono, supra at 859.

This Court has acknowledged in dicta but never squarely decided the proper application of the plain error rule in a civil case. United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936).

IV. Conclusion

There is a serious conflict among the Circuits on standards for judging the sufficiency of objections under Rule 51 and on standards for the use of the plain error rule to allow appellate review despite inadequate objections. The restrictive effect of the First Circuit's exacting standard for judging the sufficiency of objections is compounded by its reluctance to recognize plain error in a civil case, so as to significantly curtail the right of appellate review in the First Circuit compared to other Circuits, a disparity that requires review and correction by the Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this Petition for Writ of Certiorari was served on the defendant by mailing to its attorney, W. Wright Danenbarger, Wiggin & Nourie, 875 Elm Street, Manchester, New Hampshire 03101, three copies of the Petition.

_____

David L. Nixon
Counsel of Record

Appendix

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 81-1253

JEANNE M. AND ROGER E. GAY,

PLAINTIFFS, APPELLANTS,

v.

LINDSAY, P.K. COMPANY, INC.,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[HON. SHANE DEVINE, *U.S. District Judge*]

Before

COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Michael P. Hall, with whom *Brown and Nixon Professional Association* was on brief, for appellants.

W. Wright Danenbarger, with whom *Wiggin & Nourie* was on brief, for appellee.

December 14, 1981

CAMPBELL, *Circuit Judge*. On July 1, 1977, plaintiff-appellant Jeanne Gay suffered severe injuries when the station wagon she was driving went out of control and rolled over. She had been returning home from the defendant-appellee P.K. Lindsay Company's plant, where she had obtained a 225-pound air compressor. Two Lindsay employees had loaded the compressor into the rear storage area of the car. Mrs. Gay and her husband, as co-plaintiff, alleged that the compressor had been negligently loaded, and that either its movement or position in the storage area caused the accident. A jury trial was held in the United States District Court for the District of New Hampshire, jurisdiction being based on diversity of citizenship. The jury returned a verdict for defendant, and plaintiffs now appeal to this court.

The accident occurred while Mrs. Gay was driving on the Everett Turnpike in New Hampshire at about 50 miles per hour. She approached a pickup truck in front of her, when a sudden cloud of sand arose in her path behind the truck. Startled, she turned the wheel; her car then swerved violently and rolled over. Plaintiffs attempted to prove that the compressor was improperly loaded in such a manner that it moved around and may have rubbed against a rear wheel well of the car. This movement and rubbing, they contended, resulted in the car's erratic behavior when Mrs. Gay reacted to the sand cloud by turning the wheel. Defendant's evidence tended to show that the compressor was loaded in a safe manner and that it did not cause the car's abrupt swing to one side.

Defendant also contended that the sand cloud was a superseding cause, the intervention of which sufficed to absolve the defendant of any liability even if its servants had been negligent. *See* Restatement (Second) of Torts § 440; *Reid* v. *Spadone Machine Co.*, 119 N.H. 457, 404 A.2d 1094, 1099 (1979). The district court instructed the jury at length on this issue. Plaintiffs now argue that the instruction was error on three separate grounds: first, they allege that it allowed the jury to find that the cloud of sand was a superseding cause even if it was reasonably foreseeable; second, they allege that it suggested that the cloud was caused by the negligence of a third party; and third, they allege that the instruction was not warranted by the evidence.

We hold that plaintiffs waived their right to raise the first and third of these grounds because they failed to object on those grounds at trial. Fed. R. Civ. P. 51. The only objection made by plaintiffs' counsel to the superseding cause instruction was as follows:

> MR. NIXON [Counsel for Plaintiffs]: . . . [T]here was allusion by the Court specifically to facts with respect to the cloud of dust indicating that the dust was caused by dirt falling from another truck when the evidence indicated there was either a patch in the road or dirt on

> the shoulder of the road or off another truck, but for some reason there was a cloud of dust ahead of her. It didn't clearly specify, but the Court's charge leaves no question that in the Court's mind the dirt came from another truck and after a lengthy course of intervening cause in that context.
>
> THE COURT: That's what the defendant claims, as the Court understands it, and I think I made it clear that was the defendant's claim and he had the burden of proof by a preponderance of the evidence. If they find it came from something other than a truck, he's out of luck on that one.
>
> MR. DANENBARGER [Counsel for Defendant]: That's correct, your Honor.
>
> MR. NIXON: The difficulty is, your Honor, that's the reason for my exception in this respect —
>
> THE COURT: I understand.
>
> MR. NIXON: — is that the only way reference came in was on the basis the dirt came from another truck, and that is not the way the evidence stands, and the jury has not heard about any other possible source of that dirt or dust cloud, whatever it was, and the supervening cause charge was emphasized again and again on that point and on others. . . .

Despite the fact that the court had already told counsel that reasons for objections must be given, and later invited counsel to "[t]ake all the objections you want," nothing further was forthcoming concerning this instruction.

The stated objection plainly refers only to the possibility that the instruction improperly suggests that "in the Court's mind the dirt came from another truck," and it was to this ground that the court addressed its response. There is no reference to any difficulties with the foreseeability of the sand cloud, or with the absence of a factual predicate for the instruction.

Fed. R. Civ. P. 51 provides,

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

The rule thus explicitly requires that the grounds of the objection be given. The purpose of this "is to afford the trial judge an opportunity upon second thought, and before it is too late, to correct" any errors. *Marshall* v. *Nugent*, 222 F.2d 604, 615 (1st Cir. 1955). Objections must be "sufficiently specific to bring into focus the precise nature of the alleged error." *Palmer* v. *Hoffman*, 318 U.S. 109, 119 (1943); *see Charles A. Wright, Inc.* v. *F.D. Rich Co.*, 354 F.2d 710, 713 (1st Cir.), *cert. denied*, 384 U.S. 960 (1966). The objection here did not relate to any difficulties with foreseeability or lack of basis in fact for the instruction. It thus did not suffice to apprise the district court of the insufficiencies in the instruction now being claimed. We therefore decline to entertain these assignments of error.[1] *See Morris* v. *Travisono*, 528 F.2d 856, 859 (1st Cir. 1976).

Respecting plaintiffs' contention that the instruction erroneously suggested that the sand cloud came from the pickup truck, the objection was sufficient to preserve this

[1] In the absence of an objection, plain error may be noted. *Nimrod* v. *Sylvester*, 369 F.2d 870, 873 (1st Cir. 1966). Plain error, however, is a rare species in civil litigation; it will be found only "to prevent a clear miscarriage of justice." *Id.*; *Morris* v. *Travisono*, 528 F.2d 856, 859 (1st Cir. 1976). We perceive nothing even approaching that standard here.

point, but we find no merit in the point itself. Plaintiffs' argument seems to be that the instruction somehow suggested that the sand cloud must have been caused by the negligence of the truck driver, and that this partially usurped the jury's role in deciding whether there was a superseding cause. But the court did not state that the sand came from the truck. Rather, it stated that this contention was "[t]he thrust of [the superseding cause] defense," and specifically noted that "the defendant has the burden of proof" on the issue. Taken as a whole, we are unable to say that the instruction assumed that the sand cloud was caused by the negligence of a third party. Rather, it directed the jury to decide for itself on this issue.

The next assignment of error concerns the district court's failure to permit plaintiffs' counsel to examine certain documents in connection with his cross-examination of Charles Dietrich, defendant's expert witness. The documents were correspondence from defendant's counsel to Dietrich on which Dietrich relied in part in forming his expert opinion. The district court examined the documents *in camera* and held that they were work product, and that plaintiffs had not made a sufficient showing of need to compel their disclosure. *See* Fed. R. Civ. P. 26(b)(3). As they did below, plaintiffs assert that Fed. R. Evid. 705 is the source of their "substantial need" of the documents. The rule provides that an expert may testify to his opinion without disclosing the facts underlying it, although the facts may be elicited on cross-examination. It therefore "assumes that the cross-examiner has the advance knowledge [of those facts] which is essential for effective cross-examination." Notes of Advisory Committee, Rule 705. Plaintiffs argue that disclosure was necessary to permit adequate cross-examination under that rule.

The documents have now been reviewed by plaintiffs' counsel for the purpose of this appeal. The nondisclosure of only one document is alleged to have resulted in prejudice. That document is a statement by Charles Copeland (president of defendant) taken by defendant's insurer. The statement contains a description of Copeland's belief as to how the com-

pressor was loaded, based, it would seem, on information from George Menard and Richard Loverling, the two men who actually loaded it. Both Menard and Loverling testified at trial that the compressor was loaded sideways, but Copeland's statement says that it was loaded with the wheels to the front. Plaintiffs argue that the statement could thus have been used to impeach Menard, Loverling, and Dietrich.

Rule 705 is inapposite to this impeachment argument. Under the rule, the cross-examiner must know the facts on which the expert's opinion is based. *See, e.g., Smith* v. *Ford Motor Co.*, 626 F.2d 784, 794 (10th Cir. 1980), *cert. denied*, 101 S.Ct. 1363 (1981). Here, plaintiffs' counsel was well aware of those facts, as demonstrated by his cross-examination of Dietrich. He knew that Dietrich's conclusions as to the cause of the accident were based on an assumption that the compressor was loaded sideways. He also knew the facts leading Dietrich to make that assumption. Copeland's statement that the compressor was loaded with the wheels forward was not a fact underlying Dietrich's conclusion. In his deposition, Dietrich testified that he had relied "in part" on the documents sent from defendant's counsel. It is now clear that this statement was not a part of what was relied upon.

To the extent that any sort of impeachment argument might be considered relevant, the Copeland statement was clearly unnecessary. Menard and Loverling had both stated at their pre-trial depositions that they thought they had loaded the compressor with its wheels forward, contrary to their assertions at trial. Plaintiffs' counsel explicitly referred to this deposition testimony while questioning Menard, Loverling, and Dietrich. Copeland's statement would have had very little, if any, additional impeachment value above that of the deposition testimony made under oath by Menard and Loverling themselves.

Finally, it seems well-settled that there is in general no justification for discovery of the statement of a person contained in work product materials when the person is available

to be deposed, as Mr. Copeland was here. *See* 8 Wright & Miller, Civil Practice & Procedure: Civil § 2025, at 215, and cases cited at note 72. In light of all these considerations, we are unable to see any error in the district court's determination that the plaintiffs did not have "substantial need" of Copeland's statement.

Plaintiffs argue further that the documents should have been disclosed pursuant to Fed. R. Evid. 612(2), which provides,

> Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, . . .
>
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
>
> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. . . .

While it is possible that materials relied on by an expert in forming his opinion may be said to come within this rule, *see Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977), plaintiffs have again waived their objection on this ground by failing to make it below. Plaintiffs' counsel argued below that he needed the materials to prepare for cross-examination under Rule 705, but never once mentioned Rule 612. The district court was thus deprived of the opportunity to exercise its discretion under the rule "in the interests of justice," and we will not now attempt to weight the appropriate factors ourselves for the first time.

Plaintiffs' final contention is that the district court erred in permitting defendant's counsel to demonstrate at the view how it contended the compressor was loaded. We fail to see any prejudice to plaintiffs in this, because plaintiffs' counsel

was immediately allowed to demonstrate the way they contended it was loaded. In the absence of any prejudicial effect, we will not reverse a trial court for alleged improprieties in the conduct of a view. *Rodrigues* v. *Ripley Industries, Inc.*, 507 F.2d 782, 787 (1st Cir. 1974); *see also* Fed. R. Civ. P. 61 (harmless error).

Affirmed.

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APPENDIX B

CIV 31 (7-63)

United States District Court

FOR THE

DISTRICT OF NEW HAMPSHIRE

CIVIL ACTION FILE NO. 78-206-D

Jeanne M. and Roger E. Gay

vs.

P. K. Lindsay Company, Inc.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Shane Devine, Chief, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the Defendant.

It is Ordered and Adjudged that the Plaintiff take nothing.

Dated at Concord, New Hampshire, this twelfth day of March, 1981.

/s/ William H. Barry, Jr.
Clerk of Court

cc: W. Wright Danenbarger, Esq.
David Nixon, Esq.

The Court's instruction in the pertinent part stated:

> If you find, however, that the defendant was legally at fault, you must then turn to consider whether or not a suerseding or intervening cause prevents the plaintiffs from recovering.
>
> The thrust of this defense, upon which the defendant has the burden of proof by a preponderance of the evidence, is to the effect that the truck which dropped the dirt or sand in front of Mrs. Gay's vehicle was the actual cause of the accident. In determining whether an intervening or superseding force bars recovery, the following important factors are to be considered: The fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the defendant's negligence; the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation; the fact that the intervening force is operating independently of any situation created by the defendant's negligence or, on the other hand, is or is not a normal result of such a situation; the fact that the operation of the intervening force is due to a third person's act or a failure to act; the fact that the intervening force is due to an act of a third persn which is wrongful toward the other and as such subjects the third person to liability to him, and the degree of culpability of a wrongful act of a third person, which sets the intervening forces in motion.
>
> Where the negligent conduct of a defendant creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause; that is, the intervention of a force which is a normal consequence of a situation created by a defendant's negligent conduct is not a superseding cuase of harm which its conduct has been a substantial factor in bringing about. If you find that there was an intervening force, not foreseeable, which was the sole proximate cause of the accident, then you will find that the defendant is not legally at fault and will return verdicts for the defendant in each of these actions (T. 991-993). (emphasis added)

Opposition

Supreme Court, U.S.
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No. 81 - 1751

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

Jeanne M. Gay and Roger E. Gay,
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Defendant, Respondent

On Writ of Certiorari to the United States
Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF ISSUES PRESENTED

1. SHOULD NOT CERTIORARI BE DENNIED WHERE THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE METHOD FOR DERTERMINING WHETHER A NARROW OBJECTION TO A PART OF A JURY CHARGE WAS SUFFICIENT TO "BRING INTO FOCUS, THE PRECISE NATURE" OF OTHER UNSTATED AND UNTIMELY OBJECTIONS TO OTHER ASPECTS OF THE SAME INSTRUCTIONS, WHERE THE CAUSE FOR THE ALLEGED "CONFLICT" AMONG THE CIRCUITS IS NOT ATTRIBUTABLE TO A LACK OF A UNIFORM METHODOLOGY BUT, RATHER, TO THE APPLICATION OF THAT METHODOLOGY TO DIVERGENT FACT PATTERNS?

2. SHOULD NOT CERTIORARI BE DENIED WHERE THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE STANDARD TO BE APPLIED IN DETERMINING WHETHER AN UNTIMELY OBJECTION TO A JURY INSTRUCTION SHOULD BE CONSIDERED ON APPEAL, WHERE THE STANDARD FOR DETERMINING PLAIN ERROR EMPLOYED BY THE FIRST CIRCUIT IS VIRTUALLY A WORD-FOR-WORD RESTATEMENT OF THE STANDARD FORMULATED BY THIS COURT, AND WHERE THERE WAS A FINDING BY THE COURT OF APPEALS THAT THERE WAS "NOTHING EVEN APPROACHING" PLAIN ERROR?

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COUNTER STATEMENT OF THE CASE

This is a diversity action for personal injuries in which Petitioners alleged that a station wagon driven by Jeanne Gay overturned because a small air compresser loaded into the cargo bay by Respondent's employees shifted when Mrs. Gay swerved to avoid a cloud of sand. The final pretrial order submitted by Petitioners stated that "plaintiff alleges that a truck in front of her dumped some sand on the road causing a cloud of sand and she swerved to avoid a collision." At trial, Mrs. Gay testified that the sand appeared to come from the truck in front of her. Her counsel stated to the Court that "there was another vehicle in front of her that dropped that sand off, there was some sand put in the road and she reacted to it and her car rolled over. . . ." In addition, there was substantial evidence from which the jury could have concluded that (a) the compressor did not shift; (b) the car was unstable prior to the accident and the front end of the station wagon was "shimming (sic) at 58 m.p.h." as Mrs. Gay drove to pick up the compressor; (c) the compressor could not have caused the car to swerve even if it had shifted; and (d) there was no foreseeable risk in placing a 225 lb. compressor in the cargo bay of a station wagon. After eight days of trial, it took the jury less than two hours to conclude that Respondent was not responsible for the accident.

Petitioners' appeal to the First Circuit Court of Appeals challenged, inter alia, the District Court's instructions regarding the appearance of the sand cloud as a superceding cause of the accident. The instruction was requested by counsel for Respondent based upon the pretrial statements and trial testimony of Mrs. Gay and the statements of her counsel at trial concerning the source of the sand cloud. Petitioners had objected to the charge at trial only upon the ground that it suggested that the cloud was caused by the negligence of a third party. This contention had been rejected by the District Court because it had stressed to the jury that this was merely a defense asserted by Respondent and that Respondent had the burden of proving each element of that defense.[1]

1. Petitioners did not submit all relevant portions of the District Court's charge on the issue of superceding cause in their Appendix C, although they did so in the Court of Appeals. The entire charge relating to superceding cause is submitted as Respondent's Appendix A.

On appeal, Petitioners further claimed that the District Court's charge was defective because it allowed the jury to find that the cloud of sand was a superceding cause even if it was reasonably foreseeable and that the instruction was not supported by the evidence.[2] The Court of Appeals declined to hear these objections because they had not been raised in a timely manner pursuant to Rule 51, Federal Rules of Civil Procedure. The Court of Appeals noted that in appropriate circumstances it would consider plain error even if no objection had been made but found upon a review of the record as a whole that there was "nothing even approaching" plain error in this case.[3]

Respondents' Petition for Writ of Certiorari contends that the opinion of the Court of Appeals should be reviewed because of alleged conflicts among the circuits concerning (1) the standard for judging the sufficiency of objections to jury instructions under Rule 51 and (2) the standard for applying the plain error rule in civil cases. It is submitted that there is no real conflict among the circuits and that any difference is attributable to the unique facts of each case.

REASONS FOR DENYING CERTIORARI

I. There Are No Conflicts Among the Circuits Requiring This Court To Act To Create A Uniform Application Of Federal Law.

Although Petitioners have suggested that there are differences in the "standards" employed by the courts of appeals to determine (a) the sufficiency of an objection under Rule 51 and (b) the application of the plain error rule, it is submitted that any difference in the result from case to case is not the result of a differing "standard" but, rather, to the application of acknowledged uniform standards to the facts of each individual case.

2. The first time that Petitioners made any sort of objection to the giving of a superceding cause instruction was in their post-trial motion for judgment N. O. V. Even then it was not clear whether they were asserting that the Court should not have referred at all to superceding cause or that the instruction contained erroneous language.

3. Respondent demonstrated in its brief to the Court of Appeals that the District Court's instructions were proper under the facts of the case.

It has been generally recognized that certiorari will not be granted where the differences between two circuits "can fairly be accounted for on the basis of variations in the factual situations among the cases involved." 13 J. Moore, Federal Practice ¶ 817.21 at SC17-22 (2d ed.) The "conflicts" posited by Petitioners are not conflicts which impair uniformity of decision and which can be eliminated by a decision in this case. Rather, the "conflicts" are the result of "hosts of particularistic applications of general rules turning upon the analysis of special states of fact." Frankfurter and Hart, The Business of the Supreme Court at October Term, 1933, 48 Harv. L. Rev. 238, 268-69 (1934). This sort of difference does not involve the type of important federal question for which certiorari is appropriate.

II. There Is No Conflict Among The Circuits Concerning The Standard To Be Applied As To Issues Not Raised In A Timely Manner In The Courts Below.

This Court has held on numerous occasions that neither it nor the courts of appeals will consider issues which were not raised in a timely manner in the courts below. **Hormel v. Helvering**, 312 U.S. 552, 557 (1941); **Singleton v. Wulff**, 428 U.S. 106, 120 (1976). This rule has been applied to a wide variety of issues in both criminal and civil actions, including the failure of counsel to make a timely objection to jury instructions.

There is, however, a corollary to this general rule which was stated in **Hormel v. Helvering, supra**, at 312 U.S. at 557, as follows:

> "There may always by exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below."

The corollary was recently affirmed by this Court in **Singleton v. Wulff, supra**, 428 U.S. at 121. The Court expressly declined to adopt any general formula for applying the long-standing rule against hearing matters wich were not raised in a timely manner and observed

that "the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." Id.

Contrary to Petitioners' contention, every court of appeals has expressly recognized the standard for review imposed by Hormel: Morris v. Travisono, 528 F.2d 856, 859 (1st Cir. 1976); Troupe v. Chicago, Duluth & Georgian Bay Transit Company, 234 F.2d 253, 259-60 (2d Cir. 1956); Newark Morning Ledger Company v. United States, 539 F.2d 929, 932 (3d Cir. 1976); United States v. Barge Shamrock, 635 F.2d 1108, 1111 (4th Cir. 1980); Carson Products Company v. Califano, 594 F.2d 553, 557 (5th Cir. 1979); Curran v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 622 F.2d 216, 227 (6th Cir. 1980); Spiegel, Inc. v. F.T.C., 540 F.2d 287, 295-96 n.11 (7th Cir. 1976); Wichmann v. United Disposal, Inc., 553 F.2d 1104, 1106 (8th Cir. 1977); Ross v. Commissioner of Internal Revenue, 652 F.2d 1365, 1368 (9th Cir. 1981); United States v. Hansen, 652 F.2d 1374, 1381 (10th Cir. 1981); Sadlowski v. United Steelworkers of America, 645 F.2d 1114, 1119 (D.C. Cir. 1981).

The standard in the First Circuit is virtually a word-for-word copy of the Hormel rule:

> "Where there is plain error we may notice such error of our own volition. This rule should be applied sparingly and only in exceptional cases or under peculiar circumstances to prevent a clear miscarriage of justice."
> Nimrod v. Sylvester, 369 F.2d 870, 873 (1st Cir. 1966)

The language in the First Circuit standard which Petitioners find so offensive- that plain error arises only in "exceptional cases or peculiar circumstances to prevent a clear miscarriage of justice" - comes directly from this Court's statement in Hormel that review is available only in "exceptional cases and peculiar circumstances . . . where injustice might otherwise result . . . "[4]

4. It has been observed that if there is to be a plain error exception to Rule 51, it should be confined to the "exceptional case" where the error has seriously affected the fairness, integrity or public reputation of judicial proceedings.
9 C. Wright & A. Miller, Federal Practice and Procedure §2558 at 675 (1971 ed.)

Petitioners' suggestion that there is a conflict among the Circuits as to this standard is simply wrong. Even if there were such a difference, certiorari should not be granted here because it is clear that the First Circuit has adopted the standard promulgated by this Court.[5]

Any differences between the various cases which have been decided by the courts of appeals, even within the same circuit, are not attributable to differing standards but, rather, to the factual differences from case to case. As this Court observed in Singleton, there can be no general formula for the application of the plain error rule and its application is committed to the sound discretion of the courts of appeals on the facts of individual cases.

In the present case, the First Circuit reviewed the record as a whole and concluded that Petitioners had shown "nothing even approaching" plain error and affirmed the jury verdict for Respondent. Petitioners have shown nothing in their Petition which would justify a different result.

III. There Is No Conflict Among The Circuits Concerning The Method For Determining Whether Objections To Jury Instructions Are Sufficient To Preserve An Issue For Appeal.

Petitioners have suggested that because in certain specific cases courts of appeals have found that the objections raised to a jury charge were sufficient to apprise the District Court of the nature of the alleged error, the failure of the First Circuit to find in their favor means that the First Circuit used a "standard" which differs from the "standard"

5. Although the Ninth Circuit has on occasion stated that it would not apply the plain error rule where counsel failed to adequately object in a timely manner to a jury instruction, it in fact has done so. See, e.g., Brown v. Avemco Investment Corporation, 603 F.2d 1367, 1374-75 (9th Cir. 1979) and cases cited therein. Even assuming that Petitioners are correct about the Ninth Circuit, this Court should not grant certiorari here merely to chastise the Ninth Circuit for a past practice which has been abandoned when Petitioners undeniably had their case decided by the proper standard in the First Circuit.

used in other circuits. Petitioners have cited several decisions by the Fifth, Sixth, Ninth, and Tenth Circuits which allegedly demonstrate that those circuits use a lesser "standard" for determining whether the trial judge was sufficiently apprised of the claimed error. However, for every case in those circuits which Petitioners find in which it has been held that an objection was sufficient, Respondent can find at least one in which the court held it was insufficient because of lack of specificity. **See, e.g., Bush v. Carpenter Brothers, Inc.**, 447 F.2d 707, 712 (5th Cir. 1971); **Delancey v. Motichek Towing Service, Inc.**, 427 F.2d 897, 900 (5th Cir. 1970); **Hageman v. Signal L. P. Gas, Inc.**, 486 F.2d 479, 485 (6th Cir. 1973); **Woodworkers Tool Works v. Byrne**, 191 F.2d 667, 676 (9th Cir. 1951); **Fox v. Ford Motor Company**, 575 F.2d 774, 789 (10th Cir. 1978); **Chiodo v. General Waterworks Corporation**, 380 F.2d 860, 864 (10th Cir. 1967). This is for the very simple reason that the sufficiency of an objection is a question which varies according to the facts of each case. It is generally recognized that issues of this nature are not appropriate for certiorari because no uniform rule can possibly result.

In **Palmer v. Hoffman**, 318 U.S. 109, 120 - 21 (1942), this Court established the only "general rule" which is appropriate: the "objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error." Based upon the unique facts of each case the courts of appeals must determine whether the trial judge in each case was aware of the precise nature of the alleged error. It is not the function of the Supreme Court to become enmeshed in the peculiar facts of each case in which a party has failed to comply with Rule 51.

Because there is no conflict among the circuits as to the proper method to be employed in determining whether an objection was sufficiently specific to preserve an issue for appeal, and there is no uniform rule which could be applied to the varying facts of each case (other than that already stated in Palmer v. Hoffman), certiorari should not be granted.[6]

6. It is noteworthy that Petitioners were not able to propose a uniform rule which this Court could promulgate.

CONCLUSION

The "conflicts" raised by Petitioners are illusory inasmuch as any difference in result among the circuits is not attributable to the use of a different "standard" but, rather, to the varying facts of each case. A decision by the Court in this case would do nothing to promote uniformity in the application of federal law and, for that reason, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix

APPENDIX A

The District Court instructed the jury on the issue of superceding cause as follows:

> "If you find, however, that the defendant was legally at fault, you must then turn to consider whether or not a superseding or intervening cause prevents the plaintiffs from recovering.
>
> The thrust of this defense, upon which the defendant has the burden of proof by a preponderance of the evidence, is to the effect that the truck which dropped the dirt or sand in front of Mrs. Gay's vehicle was the actual cause of the accident. In determining whether an intervening or superseding force bars recovery, the following important factors are to be considered: The fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the defendant's negligence; the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation; the fact that the intervening force is operating independently of any situation created by the defendant's negligence or, on the other hand, is or is not a normal result of such a situation; the fact that the operation of the intervening force is due to a third person's act or a failure to act; the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him, and the degree of culpability of a wrongful act of a third person, which sets the intervening forces in motion.
>
> Where the negligent conduct of a defendant creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause; that is, the intervention of a force which is a normal consequence of a situation created by a defendant's negligent conduct is not a superseding cause of harm which its conduct has been a substantial factor in bringing about. If you find that there was an intervening force, not

foreseeable, which was the sole proximate cause of the accident, then you will find that the defendant is not legally at fault and will return verdicts for the defendant in each of these actions (T. 991-993). (emphasis added)

* * *

If you have found such negligence, then you must further consider, under all of the circumstances des-described [sic] in the evidence, whether the negligent act or omission of the defendant played a substantial part in bringing about or actually causing the injuries or damages complained of by the plaintiffs. If you find that is has, you must then turn to the issue of intervening or superseding cause. If you find that it has not, then, again, that is the end of the cases and your verdicts should be for the defendant.

If you turn to the issue of intervening or superseding legal cause, you must determine whether under all of the circumstances outlined in the evidence the actions of a third person or persons which were not reasonably foreseeable and for which the defendant could not be held responsible were sufficient to constitute the sole proximate cause of the accident and if not, you must then turn to the issue of the comparative legal fault as to each plaintiff. If you find there is such intervening legal cause as to bar recovery by the plaintiffs, you verdicts will again be for the defendant and that will be the end of the cases (T. 1000-1001). (emphasis added)

CERTIFICATE OF SERVICE

I hereby certify that this Brief of Respondent in Opposition to Petition for Writ of Certiorari was served on the Petitioners by mailing to their attorney, David L. Nixon, Brown and Nixon Professional Association, 80 Merrimack Street, Manchester, New Hampshire 03101, three copiers of the Brief.

_____

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